SUPREME COURT, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1569

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN PIMENTEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence was properly admitted under the inevitable discovery doctrine.

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OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of conviction (Pet. App. 1a-3a) is reported at 841 F.2d 1117 (Table). The opinion of the court of appeals reversing an order suppressing evidence (Pet. App. 4a-11a) is reported at 810 F.2d 366. The opinion of the district court suppressing evidence (Pet. App. 12a-20a) is unreported. The prior opinion of the district court (Pet. App. 21a-24a) is reported at 626 F. Supp. 1372.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. The petition for a writ of certiorari was filed on March 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were

convicted of conspiracy to defraud the Department of Defense (Count 1), in violation of 18 U.S.C. 371; submitting false statements to the United States (Counts 2 and 3), in violation of 18 U.S.C. 1001; and submitting false claims against the United States (Counts 4-7), in violation of 18 U.S.C. 287. Petitioner Pimentel was sentenced to concurrent terms of three years' imprisonment on Counts 2 through 7, he was fined $5000 on Count 1, and he was ordered to make restitution. Petitioner Duroyd Manufacturing Company (Duroyd) was fined $70,000 and was also ordered to make restitution. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial, which is not in dispute, showed that Pimentel was the sole owner of Duroyd.[1] In early 1982, Duroyd bid on a Department of Defense contract to manufacture certain metallic and nonmetallic parts used in an artillery shell. One such part was a column segment, which, according to the contract, had to be manufactured to a specified level of hardness. The contract price was supposed to equal Duroyd's projected costs plus a percentage for overhead and profit. The contract required that Duroyd certify that the cost and pricing data submitted with the bid were "accura[te], complete[], and curren[t]."

Duroyd submitted a bid that included the cost of a heat-treating process supposedly needed to bring the steel to the required hardness level. Duroyd certified that the cost estimate contained in the bid was "accura[te], complete[], and curren[t]." In fact, however, Mundex Metals Corporation had already informed Duroyd that it could deliver steel to Duroyd at the specified hardness level without any additional cost for heat treating. In a letter of

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[1] The statement of facts is taken from the briefs filed by the government in the court below (Nos. 86-1271 and 87-1354).

March 2, 1982, Mundex informed Duroyd that "[w]e have discussed in detail with our mill your requirements, particularly with regard to hardness, and are pleased to inform you that the mill is now in a position to guarantee a hardness of min. Rockwell C-22." GX 12; C.A. App. A135.[2] After receiving that letter, Pimentel requested that Mundex submit a new letter omitting all reference to the specified hardness level. Mundex complied with that request. Under a cover letter of March 19, 1982, Mundex supplied a revised, backdated version of the March 2 letter that did not refer to the hardness of the steel. GX 6; C.A. App. A134, A136. Duroyd attached the backdated letter to its bid. In September 1982, Duroyd was awarded the Defense Department contract. Mundex supplied the steel to Duroyd at the specified hardness level, and Duroyd was not required to harden any of the steel.

In November 1983, the Defense Contract Audit Agency decided to conduct a post-award audit of Duroyd in connection with the contract and assigned Neil Hanrahan to conduct the audit. At a pre-audit conference, Hanrahan asked Duroyd to provide him with its files of vendor quotations, vendor invoices, purchase orders, and incurred costs. In reviewing the files, Hanrahan discovered that the files did not contain any invoices for heat treating the steel used in manufacturing the column segments, even though that cost item had been included in Duroyd's proposal package. When Hanrahan asked Pimentel when he had first learned that Mundex could supply prehardened

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[2] "C.A. App." refers to the appendix filed in the court of appeals on the government's interlocutory appeal from the order of the district court suppressing the evidence (No. 86-1271). That appendix contains the district court's initial bench ruling on the suppression motion (C.A. App. A119-A129), which is not included in petitioners' appendix. A copy of this ruling is attached.

steel, Pimentel falsely replied that he first learned that Mundex could do so in October or November of 1982. Thereafter, pursuant to Pimentel's instructions, an employee of Duroyd asked Mundex to write two letters to Duroyd backdated to April 5, 1982, and December 2, 1982. The first letter stated that Mundex could not provide steel at the necessary hardness level. GX 16. The second letter stated that Mundex had improved its manufacturing process and could now manufacture steel at the required level of hardness. GX 17. Those two letters were turned over to the Department of Defense in an attempt to rebut the conclusion reached by Hanrahan that Duroyd had failed in 1982 to make full disclosure of its cost and pricing data regarding the heat treatment.

In the course of his audit, Hanrahan discovered the earlier, March 1982 letters from Mundex to Duroyd. Hanrahan testified that those letters were given to him by a Duroyd employee at his request (C.A. App. A83-A95), but petitioners contended that Hanrahan had taken them from Duroyd's files without permission (*id.* at A50-A56, A63-A65, A69-A70).

2. Before trial, petitioners sought to suppress the March 1982 letters from Mundex to Duroyd showing Pimentel's knowledge that Mundex could supply steel for the column segment without any need or charge for heat treating. The district court found that the government had not proved by a preponderance of the evidence that Hanrahan obtained those items with Duroyd's consent (C.A. App. A121; App., *infra*, 2a). It therefore held that Hanrahan had conducted an illegal warrantless search in violation of the Fourth Amendment.

The court observed, however, that the letters would inevitably have been discovered during the course of the audit. C.A. App. A121-A122; App., *infra*, 3a. The court explained that a government regulation required Duroyd

to turn over the letters to the auditor on request, and therefore Duroyd did not have a reasonable expectation of privacy in the letters. Moreover, when the audit failed to turn up a bill for heat treatment, the court found that Hanrahan would have interviewed Mundex, the steel vendor, as well as the company that was supposed to supply the heat treatment, according to Duroyd's bid proposal, to find out why there had been no heat treatment. C.A. App. A129; App., *infra,* 2a-8a. Mundex, in turn, would have disclosed to Hanrahan that the steel was already heat treated. For that reason the court concluded that "these documents would have been found in any event as a result of the audit, that the audit was started, of course, before these documents were found or known to the government, and therefore the prosecution here is not the fruit of the poison[ous] tree." C.A. App. A122; App., *infra,* 3a. The court suppressed the letters, but permitted the government to prove "by independent evidence" that false claims were submitted and that no money was paid for heat treatment. C.A. App. A122-A123; App., *infra,* 3a-4a.

On reconsideration, the district court suppressed the letters on the ground that the inevitable discovery doctrine does not apply to "the poisonous tree," but only to the "fruit of the poisonous tree." In the court's view, the letters were the "poisonous tree." Pet. App. 22a-24a. On further reconsideration, the district court reversed its earlier finding that the letters would have been inevitably discovered. It now concluded that "the auditor did not have the right to demand copies of these vendor quotes, and Duroyd did not have the obligation under the contract to provide them to him" (*id.* at 17a).

3. The court of appeals reversed. Pet. App. 4a-11a. At the outset, the court held that there "can be no question concerning the Defense Department auditor's right to examine these letters in the course of his audit" (*id.* at 6a).

Both the statutes and the contract so provide (*ibid.*). The court of appeals thus concluded that the district court's original finding that the letters would inevitably have been discovered during the course of the audit was correct (*id.* at 8a). The court further held that the inevitable discovery doctrine, which was first adopted by this Court in *Nix* v. *Williams*, 467 U.S. 431 (1984), "applies to the direct as well as the indirect products" of an unlawful search (Pet. App. 8a). To reach that conclusion, the court observed that several court of appeals decisions cited with approval in *Nix* applied the doctrine to the direct products of a constitutional violation. See *United States* v. *Romero*, 692 F.2d 699 (10th Cir. 1982); *United States* v. *Apker*, 705 F.2d 293 (8th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Roper*, 681 F.2d 1354 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983). The court of appeals noted that the district court had mischaracterized the letters as "the poisonous tree." Rather, the illegal search was the "the poisonous tree"; the letters were the "fruit" or product of that illegality. Pet. App. 7a n.1. Finally, the court held that no deterrent purpose would be served by suppression, because the ongoing audit "would have uncovered the letters at issue[;] [a]dmitting them in evidence would not encourage Fourth Amendment abuse" (*id.* at 10a).

4. Following reversal of the suppression orders, petitioners were tried by a jury, convicted on all counts, and sentenced. The court of appeals affirmed their convictions without revisiting the exclusionary rule issue. Pet. App. 1a-3a.

ARGUMENT

Petitioners contend that the March 1982 letters from Mundex to Duroyd should have been suppressed. They do not dispute the finding of the district court in its oral opinion, which was upheld by the court of appeals, that the government carried its burden of proving by a pre-

ponderance of the evidence (see *Nix* v. *Williams*, 467 U.S. at 444 & n.5) that the government would inevitably have discovered the letters during the course of the audit. In particular, petitioners do not dispute that, pursuant to the terms of Duroyd's contract and the pertinent statute and regulation,[3] the Defense Department auditor had an absolute right to examine all vendor quotations, vendor invoices, and purchase orders, including the file containing the original and the replacement March 2 letters from Mundex. They do not dispute that auditor Hanrahan had requested to see all such documents before the audit began and that Duroyd was required to turn the letters over to Hanrahan pursuant to that request. Nor do they dispute that Hanrahan would have interviewed representatives of Mundex to determine why the file did not contain any invoices for heat treatment, and that those interviews would have led to the discovery of the same information.

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[3] 10 U.S.C. 2306(f)(3) provides:

> For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

Similarly, Defense Acquisition Reg. § 7-104.41(c) provides:

> *Cost or Pricing Data.* If the contractor submitted cost or pricing data in connection with the pricing of this contract * * * the Contracting Officer or his representatives who are employees of the United States Government shall have the right to examine all books, records, documents and other data of the Contractor related to the negotiation, pricing or performance of such contract, change or modification, for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted.

We submit that the decision of the court of appeals is correct. All of the prerequisites to the application of the inevitable discovery rule heretofore recognized by this Court and the federal courts of appeals have been met, including the requirement imposed by some courts that there be an ongoing investigation at the time of the illegality.[4] The government therefore should not be placed in a *worse* position by suppression of the letters than it would have occupied if no misconduct had occurred (*Nix* v. *Williams*, 467 U.S. at 443, 445, 447). There is no basis in the rationale of *Nix* for the rule, which petitioners urge, that the government should be deprived of evidence that it inevitably would have obtained just because that evidence can be labeled the "direct" rather than the "indirect" product of a search that has been held unlawful.

Nevertheless, petitioners' proposed rule resembles the argument advanced by the petitioners in *Murray* v. *United States*, No. 86-995, and *Carter* v. *United States*, No. 86-1016 (consolidated; argued Dec. 8, 1987), that all "primary" as opposed to "derivative" evidence must be suppressed without regard to the inevitable discovery and independent source doctrines. See also *People* v. *Stith*, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987). We therefore agree with petitioners that this case should be held pending the Court's decision in *Murray*. If the

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[4] See *United States* v. *Namer*, 835 F.2d 1084, 1088 (5th Cir. 1988) (citing *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985)), cert. denied, No. 87-1404 (May 16, 1988); *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). In a single cryptic sentence, petitioners state that "[t]he court of appeals did not make a specific finding that the audit would have been pursued even had the letters not been unlawfully observed and taken" (Pet. 5). To the contrary, the court of appeals observed that "there was an ongoing audit which surely would have uncovered the letters at issue" (Pet. App. 10a).

Court adopts the distinction between "primary" and "derivative" evidence that is being urged in *Murray*, this case should be remanded to the court of appeals for further consideration. Otherwise, there is no need for this Court to review the straightforward application of the inevitable discovery rule by the court below, and the petition should be denied.[5]

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[5] In *Murray*, the event that inevitably would have led (and in fact did lead) to the discovery and seizure of the evidence in question was the acquisition of a valid search warrant. The bales of marijuana at issue in that case had earlier been seen during a warrantless search of the premises, which the court of appeals assumed to be illegal. Petitioners in *Murray* have made various arguments based on the Warrant Clause of the Fourth Amendment; they describe their case (and a larger class of cases including *Segura* v. *United States*, 468 U.S. 796 (1984), and *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974)) as "search-unlawfully-first-get-the-warrant-later" cases. The *Murray* petitioners' arguments in this regard, even if accepted by this Court, would be of no help to petitioners in this case. The government's (now undisputed) factual contention is not that it would have discovered the March 1982 letters pursuant to a warrant, but that the ongoing audit would have led inevitably to the discovery of those letters. Thus, even if petitioners prevail in *Murray*, it may not be necessary or appropriate for the court of appeals to consider further its decision in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Murray* v. *United States*, No. 86-995, and *Carter* v. *United States*, No. 86-1016, and then disposed of in light of that resolution.

Respectfully submitted.

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MAY 1988

APPENDIX

Court's Decision

* * * * *

THE COURT: Well, you people have come up with a rather difficult motion and the court has been giving it consideration.

The court makes the following findings of fact and conclusions of law.

The court takes the position that the burden of proof is upon the government in a situation involving a consent search, which is really what this is, to prove by a preponderance of the credible evidence that the documents obtained were obtained as a result of a consent on the part of the person having standing to assert a Fourth Amendment right with respect to the paper or document.

In this case the court finds that the documents are the property of Duroyd Manufacturing Company and that it has a Fourth Amendment right in the security of its own papers, including these highly incriminating letters, and the court finds itself confronted with a difficult question as to credibility, and the court observed all of the witnesses, and particularly observed the witness Petrone. The court accepts as truthful his statement as to the methods of keeping the files there, and also that he did not personally put the green file in the audit-room which had been given to Mr. Hanrahan to do his work. The court does not believe that Mr. Pimentel put it there.

I am not making a finding that Mr. Hanrahan is necessarily untruthful, but it's a question of the weight of the testimony. I don't think anybody is deliberately lying in this context. I think everyone has some degree of interest in the matter.

There is circumstantial evidence which supports the truth of the defendant's version here, that being that once these letters were discovered they suddenly changed the methods of dealing with the auditor.

The court notes that Manfred Goldstein was not produced as a witness. His testimony would have been admissible under rule 801(d)(1)(A)(1), and since he is not an attorney, the court understands, he won't be privileged, so if anyone has told a tall story in this hearing they are likely to have a problem. But the court to the best of its ability has weighed the evidence here.

The court finds and concludes that the letters were not obtained by the government as a result of a consent or a voluntary production of them or even a negligent production of them, and while the complaints against Mr. Hanrahan's actions may be somewhat overblown, the court does accept at least that much of the testimony that the green file was found in that office, made available to Hanrahan, and that this was disturbing to the defendants, probably because they had a guilty conscience on this point, a consciousness of guilt. It made them outraged to find that this file was there, and I at least believe for purposes of this hearing, they did in fact consult Mr. Manfred Goldstein, and Mr. Goldstein told them to demand that in the future all papers be requested in writing and to make Mr. Pimentel the sole person dealing with the auditor.

So the court believes that the documents were not obtained, Exhibits 2 and 3, as a result of a consent search or a voluntary production or even a negligent production, which would be equivalent to voluntary, and that the government has not proved that in the case by a preponderance of the credible evidence as it is required to do having the burden on this type of a hearing.

The court finds no further than that. Specifically I decline to accept any theory that this investigation is a

fruit of the poison tree. The court regards the documents, since they belong to the corporation, as being governed by Regulation 7-104.41, and the court believes that that regulation was sufficient notice to the corporation that any document which met the definition there was something which the government had the right to inspect at all times or reasonable times while in the possession of the contractor, in this case the corporate defendant, Duroyd Manufacturing Company, and I regard as irrelevant any notion that the Department in the auditing of its contracts has treated this clause as more restrictive than its precise words imply.

The test here for Fourth and Fifth Amendment purposes is one of the reasonable expectation of privacy and confidentiality. Nobody could read that regulation and believe that this kind of a paper in the corporation's posssession and belonging to the corporation could not be examined or required to be produced by the Department of Defense auditors.

So, I therefore conclude that these documents would have been found in any event as a result of the audit, that the audit was started, of course, before these documents were found or known to the government, and therefore the prosecution here is not the fruit of the poison tree. However, I think it is proper to uphold the Fourth Amendment jurisprudence which has been inflicted on us by the Supreme Court and with which I do not agree, but it is my duty to follow the case law to the best of my understanding and belief, and I do.

Accordingly, the court adjudges that these particular two letters, Exhibits 2 and 3, are suppressed, but that that is an adequate remedy and that the prosecution is not the fruit of the poison tree and the government may go to trial

on such counts of the superseding indictment to be filed here which do not found themselves specifically on those papers.

In other words, the government can prove by independent evidence, if it has such a trial, the fact that false claims or false statements were submitted to the government other than these two documents, and can prove independently that no money was paid for heat treatment, if that's what the gravamen of the charges are.

The court has assumed and I think all counsel have assumed in this hearing that a superseding indictment will be substantially the same as the existing indictment except more specific, and the court has assumed, although nobody has said so, that the document or false writing used in Count Three or relied upon in Count Three, that letter is not the letter which is Exhibit 2, but if I am incorrect on that, then Count Three would not be capable of being the subject of a trial since the letter itself is being suppressed.

Is there a different letter in Count Three?

MR. PITMAN: Yes, your Honor, there is.

THE COURT: That has to be made clear. The court at this time entertains requests to make any further or additional findings of fact or conclusions of law.

MR. PITMAN: May I be heard briefly, your Honor. In your Honor's findings of fact your Honor concluded that Exhibits 2 and 3 would have been found in any event, that they were subject to the regulation.

THE COURT: Well, certainly Exhibit 2 is. I am not so sure about Exhibit 3, becaue that may not literally—may I see that again, please. Exhibit 3—yes, I think because of the second paragraph that too would have been found.

MR. PITMAN: Your Honor, if I may, under the Supreme Court decision of Nix v. Williams, the government will submit that these two documents would never-

theless be admissible. Nix v. Williams holds even when there is an illegal search, if the objects found in that search would inevitably have been discovered in any event, the breach of the Fourth Amendment is immaterial and the results of the search are admissible.

Nix v. Williams, as your Honor may recall, was the case involving the defendant who was believed to have murdered a young girl. He was interrogated by the police without a lawyer regarding the location of the girl's body, the so-called Christian burial speech was given. And based upon the interrogation—

THE COURT: That's a confession case?

MR. PITMAN: It's a Fourth Amendment case, your Honor. And that case stands for the proposition that even when there is an illegal search, if the object would have inevitably discovered, it is nevertheless admissible.

THE COURT: Well, I always treated that case as being a confession case.

What do you say about that, Mr. Sauber?

MR. SAUBER: Your Honor.

THE COURT: If it is as simple as all that, there was no use in this motion.

MR. SAUBER: I am not familiar with Nix and I will read it. But I understood your ruling to be—

THE COURT: The public would have found the body in the Nix case? Somebody would have stumbled over it?

MR. PITMAN: There was an organized search party, a search being conducted of the interrogation.

THE COURT: That may be a little different. In the actual context of this case, I think the court should adhere to its decision.

All right, now, do you want to come over here and tell me what you want to do?

MR. SAUBER: Yes, your Honor.

MR. PITMAN: Your Honor may I be heard?

THE COURT: Do you want to be heard further on the record? All right.

MR. PITMAN: Your Honor, I have here a copy of the decision in Nix v. Williams, and the focus of the court in court's decision in Nix v. Williams was to insure that the exclusionary rule does not put the prosecution in any worse position than it would have been in had an illegal search not taken place.

THE COURT: You are not, I don't believe, because it is quite clear to me from my brief exposure to this case today that it will be very easy to determine that that heat treating company never heat treated anything. Isn't that true?

MR. PITMAN: That's correct.

THE COURT: And that would be regarded as a false statement, if somebody says they did heat treat and they paid them money and they didn't in fact heat treat.

MR. PITMAN: Your Honor, the gravamen of the offense here with respect to the heat treatment was that Duroyd knew prior to the bidding on this contract that heat treatment was not necessary, that Duroyd knew in 1982 before it submitted its bid proposal to the Department of Defense that Mundex could provide the metal at R C 22 without heat treatment. In order to cover up that fact it solicited the second letter, the March second letter, submitted that second March 2 letter to the government and told the government that heat treatment was necessary, and included cost for heat treatment as a component part of its bid proposal.

So the fact that there was no heat treatment here is not critical. The critical fact is that Duroyd knew in 1982 that heat treatment was not necessary, but nevertheless misrepresented to the government that heat treatment was in fact necessary. It had the written representation from its contractor that the metal could by supplied at the specified

hardness without heat treatment and the government submits that in light of the court's finding that these two letters would have been discovered in any event, exclusion of these letters does put the government in a worse position than it would have been in had there been no illegal search, that the whole purpose of the inevitable discovery doctrine as articulated in Nix v. Williams is to insure that the prosecution is not put in a better position because of the illegal search but also to insure that it is not put in a worse position because of the illegal search.

In effect where evidence would have inevitably been discovered—

THE COURT: My understanding is that as soon as the auditor found there was no heat treatment, the contracting officer would have recovered the money from Duroyd. That was my understanding of Mr. Hanrahan's testimony. He went in to see what was done in performance of the contract in a post audit investigation on his part and he would have inevitably found that this heat treatment was never done, that there was no bill for it, or that the vendor, I guess he told me there was no bill for it, and that Duroyd never obtained it and there would have been a recovery of that amount.

MR. PITMAN: Your Honor, as I understand Mr. Hanrahan's testimony, as I understand the facts in this case, the heat treatment would have only been recoverable had there been evidence that Duroyd knew prior to its bid that heat treatment was not necessary. I mentioned at the start of today's proceedings and maybe I didn't make myself clear that this contract was negotiated on a cost plus basis. It was a fixed price contract negotiated on a cost plus basis.

That is, the contract price was arrived at by taking the contractor's costs, adding a percentage for overhead and profit, and setting the contract price at that level. After the

contract was executed, any increase or decrease was borne by the contractor. He would get the benefit of any new events or would bear the burden of any events that were adverse to the contract price but up until the execution of the contract, the contractor was under an obligation to make full disclosure to the government and the gravamen of the offense here is that the contractor knew in 1982 that heat treatment was not necessary, nevertheless failed to disclose this fact to the government.

THE COURT: Would the post completion audit have showed that they did not in fact pay for heat treatment?

MR. PITMAN: Yes, it would, your Honor. I believe Mr. Hanrahan testified that he found no invoices for heat treatment.

THE COURT: That's what I thought he said and that would have inevitably led him to the heat treatment vendor and the steel vendor and he would have asked him how come there is no heat treatment, and he would have found that the goods were submitted as already treated.

MR. PITMAN: That's correct, your Honor.

THE COURT: So you are not in a worse position. You can prove it easily enough. You don't need the letters to prove it.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60452